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No. 99-1723

In the Supreme Court of the United States

KLAMATH DRAINAGE DISTRICT, ET AL., PETITIONERS

v.

ROGER PATTERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' request that this Court should excise a portion of the court of appeals' opinion, leaving the judgment undisturbed, represents an appropriate exercise of this Court's certiorari jurisdiction.

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OPINIONS BELOW

The initial opinion of the court of appeals is reported at 191 F.3d 1115. The order of the court of appeals on denial of rehearing (Pet. App. 1a-2a) is reported at 203 F.3d 1175. The amended opinion of the court of appeals (Pet. App. 1a-13a) is reported at 204 F.3d 1206. The opinion of the district court (Pet. App. 14a-26a) is reported at 15 F. Supp. 2d 990.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1999. A petition for rehearing was denied on January 28, 2000 (Pet. App. 1a). The petition for a writ of certiorari was filed on April 27, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Bureau of Reclamation (Bureau or BOR), an agency within the Department of the Interior, is charged with the administration of the Klamath Project. Administration of the Klamath Project involves the management of water levels in, and the distribution of water from, Upper Klamath Lake in the State of Oregon. The lake level is managed, in part, by control of the Link River Dam, which is owned by the BOR and operated, pursuant to a 1956 contract with the Bureau, by a private utility, respondent PacifiCorp. Pet. App. 2a-3a, 15a.

In managing the Klamath Project, the Bureau must take account of a variety of competing concerns. Those include the need to protect fish and wildlife, including species listed as threatened or endangered under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*; the United States' obligations as trustee for resources held in trust for Indian Tribes; and the BOR's contractual commitments to provide water to irrigators for agricultural purposes. The BOR has initiated a process for developing a long-term operations plan for the Klamath Project. In the meantime, the Bureau intends to proceed on the basis of one-year interim plans. In 1997, the United States and PacifiCorp entered into a temporary modification of the 1956 contract. Under the modification, the Bureau took over responsibility for specifying operations of Link River Dam for the remainder of 1997 according to the Bureau's 1997 interim operations plan for the Klamath Project. Pet. App. 4a-5a, 16a-18a.

Irrigators' rights to water from the Klamath Project derive from individual repayment contracts with the Bureau. Those contracts typically include a provision

absolving the Bureau of liability if it is unable to provide the quantity of water anticipated under the contract as a result of "drought * * * or other causes." Pet. App. 16a. In *O'Neill* v. *United States*, 50 F.3d 677 (9th Cir.), cert. denied, 516 U.S. 1028 (1995), the court of appeals addressed the question whether shortages caused by BOR's compliance with statutory requirements—in that case, the ESA and the Central Valley Project Improvement Act—were covered by similar contractual language. See *id.* at 682-683. The court concluded that the pertinent contract provision "unambiguously absolves the government from liability for its failure to deliver the full contractual amount of water where there is a shortage caused by statutory mandate." *Id.* at 689.

2. Although federal reserved water rights for an Indian Tribe derive from and are defined by federal law, the quantification of such reserved water rights may take place in the context of a general stream adjudication in state court, pursuant to the waiver of the United States' sovereign immunity in the McCarran Amendment, 43 U.S.C. 666. The State of Oregon has established a statutory procedure to determine the surface water rights of all claimants in the Klamath River Basin in Oregon. See *United States* v. *Oregon*, 44 F.3d 758, 764 (9th Cir. 1994), cert. denied, 516 U.S. 943 (1995). In *United States* v. *Oregon*, the court of appeals held that the waiver of federal sovereign immunity contained in the McCarran Amendment applies to the Oregon proceeding. 44 F.3d at 763-770.

3. Petitioners are irrigators and a non-profit association of irrigators. They filed suit in federal district court, arguing (*inter alia*) that they were third party beneficiaries of the 1956 contract between PacifiCorp and the United States, and that the 1997 modification

breached their rights under that contract. Pet. App. 5a, 18a. PacifiCorp filed a counterclaim for a declaratory judgment, asking the district court to declare that

> (1) [petitioners] are not third party beneficiaries to the 1956 contract with respect to irrigation water, and the contract creates no rights in [petitioners] to irrigation water; (2) the 1956 contract may be amended with regard to PacifiCorp's rights and obligations to operate Link River Dam without [petitioners'] consent; and, (3) PacifiCorp is not liable to [petitioners] under the 1956 contract for implementing [the BOR's] water allocation decisions for the Klamath Project.

Id. at 25a-26a.

After the district court granted BOR's motion for summary judgment on petitioners' claim under the National Environmental Policy Act of 1969 (NEPA), petitioners moved for voluntary dismissal without prejudice of their remaining claims. Pet. App. 18a-19a. The court subsequently granted motions filed by PacifiCorp and BOR for summary judgment on PacifiCorp's counterclaim. *Id.* at 19a-26a. The court acknowledged that "[t]he 1956 contract operates to [petitioners'] benefit by impounding irrigation water, and certainly was entered into with irrigators in mind." *Id.* at 24a. It held, however, that petitioners "are not parties to the contract and there is no manifestation of intent by the parties to provide to the many irrigators participating in the project the right to sue under the contract or veto proposed modifications to it." *Ibid.* The court stated, in that regard, that "[t]o allow [petitioners] to sue for a shortage under the 1956 contract, to which they are not parties, in the face of the hold harmless provision contained in their individual repayment con-

tracts, to which they are parties, would be inconsistent and is not supported by the record." *Id.* at 25a. The court therefore granted PacifiCorp's request for a declaratory judgment. See *id.* at 26a (stating that PacifiCorp's "requested declarations are hereby adopted").

4. The court of appeals affirmed. Pet. App. 1a-13a.

a. The court first held that petitioners were not intended third-party beneficiaries of the 1956 contract. Pet. App. 6a-10a. The court explained that the text of the contract does not reflect an express or implied intent to grant petitioners enforceable rights. *Id.* at 7a-9a. While acknowledging that "the Contract operates to [petitioners'] benefit by impounding irrigation water," *id.* at 9a, the court stated that "to allow [petitioners] intended third-party beneficiary status would open the door to all users receiving a benefit from the Project achieving similar status, a result not intended by the Contract," *id.* at 10a.

b. The court of appeals also addressed petitioners' contention that the district court had erred in granting PacifiCorp's counterclaim and adopting PacifiCorp's requested declarations. Pet. App. 10a-13a. The court of appeals upheld the rulings of the district court. It explained that the 1956 contract "makes clear that the United States retains overall authority over decisions on use of Project water," and that PacifiCorp was therefore entitled to "immunity from suit in implementing [BOR's] 1997 plan." *Id.* at 11a. The court also held that BOR, in administering the Klamath Project, is subject to obligations imposed by the ESA. *Id.* at 11a-12a.

Finally, the court addressed BOR's obligation, in managing the Klamath Project, to protect the water rights of Indian Tribes. The court stated that "[s]imilar to its duties under the ESA, the United States, as a

trustee for the Tribes, has a responsibility to protect their rights and resources." Pet. App. 12a. The court cited its prior decision in *United States* v. *Adair*, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984), for the propositions that "the Klamath Basin Tribes hold implied water rights to support hunting and fishing rights guaranteed by treaties," and that "water rights for the Klamath Basin Tribes carry a priority date of time immemorial." Pet. App. 12a (internal quotation marks omitted).[1] The court concluded that "[b]ecause [BOR] maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the [petitioners]." *Id.* at 12a-13a.

c. Petitioners filed a Petition for Rehearing or Modification, with Suggestion for Rehearing En Banc. The court of appeals denied rehearing and rehearing en banc, but it amended its opinion by adding a new footnote 3. See Pet. App. 2a, 13a n.3. Footnote 3 recognizes that the ongoing Oregon state proceeding (see p. 3, *supra*) "is a comprehensive water rights adjudication contemplated by the McCarran Amendment, 43 U.S.C. § 666, and questions of relative amounts and priorities, at least within the State of Oregon, will be decided there." Pet. App. 2a, 13a n.3. The court of appeals explained that its "decision in this case and that of [the] district court relate only to questions involving the Bureau's operation and management of the Project, not to the relative rights of others not before the court to the use of the waters of the Basin." *Ibid.*

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[1] The term "Klamath Basin Tribes" includes the Klamath, Yurok, and Hoopa Valley Tribes. Pet. App. 4a.

ARGUMENT

Although petitioners at one point characterize their requested disposition as a "summary reversal" (Pet. 25), they do not in fact seek alteration of the court of appeals' judgment. Rather, they ask this Court to excise a portion (Section II.B.3, see Pet. App. 12a-13a) of the court of appeals' opinion, while leaving the court's judgment intact. See Pet. 3-4, 26. We are aware of no case in which this Court has granted such a request, and petitioners' proposed disposition is inappropriate here. The petition for a writ of certiorari should be denied.

1. This Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956); accord, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 & n.8 (1984). It is not clear that petitioners' request for revision of the court of appeals' opinion, unaccompanied by any challenge to the underlying judgment, presents this Court with an Article III "Case[]" or "Controvers[y]." But even assuming that constitutional requirements are met, the petition does not satisfy the criteria for invoking this Court's discretionary jurisdiction. Petitioners do not contend that the legal pronouncements contained in Section II.B.3 of the court of appeals' opinion conflict with decisions in other circuits or otherwise warrant this Court's plenary review. They argue instead that the court of appeals should not have addressed questions concerning tribal water rights at all because those questions were not sufficiently related to the issues actually contested by the parties. There is no reason, however, for this Court to devote its limited resources to the identification and

excision of purportedly objectionable language in lower court opinions.

Petitioners contend (Pet. 22-23) that there is "a high risk that the Ninth Circuit's ruling on a question involving federally-based tribal water rights will be viewed as binding in the current [Oregon] state stream adjudication, or in subsequent litigation involving the downstream portion of the river in California." That prediction, however, is inconsistent with petitioners' basic contention that the court of appeals ought not to have addressed the issue of tribal water rights. "Under the doctrine of collateral estoppel, * * * the judgment in the prior suit precludes relitigation of issues *actually litigated and necessary to the outcome of the first action.*" *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979) (emphasis added). If (as petitioners contend) the questions discussed in Section II.B.3 of the court of appeals' opinion were neither litigated by the parties nor necessary to the judgment, the court's opinion will not be entitled to preclusive effect in a subsequent action. Moreover, the court of appeals on denial of rehearing expressly disavowed any intent to bind the adjudication of water rights in Oregon's ongoing proceeding. The court of appeals recognized that the pending Oregon proceeding "is a comprehensive water rights adjudication contemplated by the McCarran Amendment, 43 U.S.C. § 666, and questions of relative amounts and priorities, at least within the State of Oregon, will be decided there." Pet. App. 2a, 13a n.3.

2. The question whether BOR must protect tribal trust resources in operating the Klamath Project—while not the primary focus of contention in the court of appeals—is substantially related to issues that were the subject of dispute. In formulating the 1997 interim plan

for the Klamath Project, BOR took into account its obligation to protect the water rights of the Klamath Basin Tribes. See Pet. App. 17a-18a. The district court entered a declaratory judgment holding (*inter alia*) that "PacifiCorp is not liable to [petitioners] under the 1956 contract for implementing [BOR's] water allocation decisions for the Klamath Project." *Id.* at 26a.

On appeal, petitioners contended that

> [w]ith respect to alleged "direction" to PacifiCorp to comply with purported tribal trust obligations of federal agencies, * * * [t]he allegation itself poses an obvious question: why is PacifiCorp responsible for meeting *Interior's* obligations? Again, the fundamental truths are that PacifiCorp is not [BOR] and [BOR] does not operate the dam. PacifiCorp is a private corporation, with both rights and obligations under a contract. [BOR] reserved no rights under the contract to direct the release of water for any other purpose than to protect water for irrigation in the Project.

Pet. C.A. Br. 57. Thus, petitioners argued that under the 1956 contract, (a) PacifiCorp rather than BOR was charged with operation of the Link River Dam, and (b) the Bureau was not authorized to direct PacifiCorp to fulfill any responsibilities that the government might have as trustee for tribal property. The court of appeals squarely rejected the first proposition, holding that "the [1956] Contract makes clear that the United States retains overall authority over decisions on use of Project water." Pet. App. 11a. It then went on to state that "[b]ecause [BOR] maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes' rights." *Id.* at 12a. While that statement may not have been strictly necessary to

the court of appeals' disposition of the case, it was closely related to the issues that had been the focus of the parties' dispute. There is consequently no basis for petitioners' contention that the court of appeals has "departed from the accepted and usual course of judicial proceedings." Pet. 16 (quoting Sup. Ct. R. 10(a)).

3. In this Court, petitioners do not challenge the court of appeals' holding that BOR rather than PacifiCorp has ultimate responsibility for the operation of the Link River Dam. Given that holding, the court of appeals correctly determined that BOR's administration of the Klamath Project must take account of tribal water rights. Petitioners contend that the court of appeals' analysis "is highly disruptive to any predictable scheme for fairly regulating water rights in accordance with their legal priorities," and that it "raises a substantial federalism question, between [BOR's] authority and that of the states." Pet. 17. That characterization misconceives the relationship between the pending state adjudication and BOR's operations plan for the Klamath Project.

The Bureau recognizes, and is currently participating in, the State of Oregon's Klamath Basin Adjudication. At some point, the State will quantify the rights of all claimants to water in the Klamath Basin in Oregon, and the Bureau will revise its operations as necessary to accommodate those determinations. While that adjudication is pending, however, the Bureau must distribute water in a manner consistent with its contractual, statutory, and trust responsibilities. And until the relative entitlements of the various claimants have been finally determined in the state proceeding, BOR must necessarily decide how its various duties are appropriately reconciled. The Bureau's acceptance of that responsibility does not amount to a final "adjudication"

by BOR of competing claims, nor does it usurp the role of the Oregon tribunals.

Carried to its logical conclusion, petitioners' argument would suggest that the Bureau is foreclosed from delivering water to anyone--including petitioners themselves—until the Oregon adjudication is completed. After all, not even petitioners have adjudicated water rights in the Klamath Basin. If the Bureau is unable to act on the basis of its own best judgment pending the resolution of state administrative and judicial proceedings, its distribution of water throughout the West will likely be stymied for a prolonged period of time. Nothing in this Court's water rights decisions, or in general principles of federalism, supports that result.

4. The court of appeals cited its prior decision in *United States* v. *Adair*, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984), for the propositions that "the Klamath Basin Tribes hold implied water rights to support hunting and fishing rights guaranteed by treaties," and that the "water rights for the Klamath Basin Tribes carry a priority date of time immemorial." Pet. App. 12a (internal quotation marks omitted). We agree with petitioners (see Pet. 21-22) that the court's description of *Adair* is somewhat imprecise. That imprecision is unlikely to have significant practical consequences, however, and it does not warrant correction by this Court.

Adair discussed the water rights of the Klamath Tribes in Oregon (see 723 F.2d at 1397-1398, 1408-1415), as distinct from the Klamath Basin Tribes (which include the Yurok and Hoopa Valley Tribes in California, see note 1, *supra*). The court of appeals' parenthetical summary of *Adair*, which describes the case as "holding that the Klamath Basin Tribes hold implied water

rights," Pet. App. 12a, is therefore technically inaccurate. The *reasoning* of *Adair* strongly suggests, however, that the Yurok and Hoopa Valley Tribes, like the Klamath Tribes, hold implied water rights. The court in *Adair* held that the hunting and fishing rights reserved to the Klamath Tribes by an 1864 treaty carry with them an implied reservation of water rights sufficient to support exercise of treaty hunting and fishing rights. 723 F.2d at 1408-1415. The Ninth Circuit has held that the Yurok and Hoopa Valley Tribes have fishing rights in the Klamath Basin. See *Parravano* v. *Babbitt*, 70 F.3d 539, 544-546 (1995), cert. denied, 518 U.S. 1016 (1996). Although no court has addressed the question whether the Yurok and Hoopa Valley Tribes possess water rights, the reasoning of *Adair* (and other precedents of this Court and the Ninth Circuit) indicates that those Tribes would have instream flow rights sufficient to support their fishing rights.

The court of appeals also cited *Adair* for the proposition that "water rights for the Klamath Basin Tribes 'carry a priority date of time immemorial.'" Pet. App. 12a (quoting *Adair*, 723 F.2d at 1414). As we explain above, the decision in *Adair* does not directly address the water rights of the Yurok and Hoopa Valley Tribes. And because the water rights of those Tribes are derived from different provisions of law than are the rights of the Klamath Tribes, the priority dates of the various Tribes are not necessarily the same.[2] The

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[2] A memorandum issued by the Regional Solicitor of the Department of the Interior states that "[t]he executive orders setting aside what are now the Yurok and Hoopa Valley Reservations also reserved rights to an instream flow of water sufficient to protect the Tribes' rights to take fish within their reservations." Pet. App. 36a. The memorandum further states

court of appeals' imprecision is unlikely to have meaningful practical consequences, however, particularly in light of its explicit recognition (see Pet. App. 2a, 13a n.3) that "questions of relative amounts and priorities, at least within the State of Oregon, will be decided" in the pending state adjudication.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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that "[t]he priority date[s] of the Yurok and Hoopa water rights are at least as early as 1891, and may be earlier." *Id.* at 37a.